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No. 89-2008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BILL CLINTON, GOVERNOR OF ARKANSAS, *et al.*,
Appellants,

v.

M.C. JEFFERS, *et al.*

On Appeal from the United States District Court for the Eastern District of Arkansas

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MOTION TO AFFIRM

P.A. HOLLINGWORTH
415 Main Street
Little Rock, Arkansas 72201
(501) 374-3420

OLLY NEAL
33 North Poplar Street
Marianna, Arkansas 72360
(501) 295-2578

DON E. GLOVER
P.O. Box 219
Dermott, Arkansas 71638
(501) 538-9071

L. T. SIMES
P.O. Box 2870
West Helena, Arkansas 72390
(501) 572-3796

PENDA D. HAIR*
SHEILA Y. THOMAS
1275 K Street, N.W.
Suite 301
Washington, D.C. 20005
(202) 682-1300

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON
NORMAN J. CHACHKIN
DAYNA L. CUNNINGHAM
99 Hudson Street
Suite 1600
New York, NY 10013
(212) 219-1900

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED

The *only* question which properly arises on this appeal is: did the court below err in applying well-settled principles announced by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and other decisions to the particular facts which it found, on the basis of overwhelming evidence, to exist and to limit the opportunities of black citizens to participate in the political process and to elect representatives of their choice in a number of Arkansas legislative districts under the State's 1981 districting plan?

TABLE OF CONTENTS

Question Presented i

Table of Authorities iii

Facts 1

REASONS FOR SUMMARY AFFIRMANCE 5

A. The Judgment Is Supported by Unimpeachable Findings on the Relevant Factors Identified in *Thornburg* and a Fully Supported Conclusion, Based on the Totality of the Circumstances, that Black Citizens' Opportunity to Participate in the Political Process and to Elect Representatives of Their Choice Was Limited and Denied by the 1981 General Assembly Districting Plan 7

B. The Legal Issues Sought to be Raised by Appellants Do Not Merit Plenary Review in this Case 22

CONCLUSION 33

TABLE OF AUTHORITIES

CASES	PAGE
Beer v. United States, 425 U.S. 130 (1976)	26
City of Richmond v. United States, 422 U.S. 358 (1975)	26
Costello v. United States, 365 U.S. 265 (1961)	28
Czaplicki v. The S.S. Hoegh Silvercloud, 351 U.S. 525 (1956)	28
Gardner v. Panama Railroad Company, 342 U.S. 29 (1951)	28
Gingles v. Edmisten, 590 F. Supp. 345 (1984), aff'd, 478 U.S. 30 (1986)	10, 23
Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985)	23
Lewellen v. Raff, 649 F. Supp. 1229 (E.D. Ark. 1986), aff'd, 843 F.2d 1103, opinion modified, 851 F.2d 1108 (8th Cir. 1988), cert. denied, 109 S. Ct. 1171 (1989)	15
Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983)	23
Mississippi Republican Executive Committee v. Brooks, 469 U.S. 1002 (1984), aff'g Jordan v. Winter, 604 F. Supp. 807 (N.D. Miss. 1984)	6, 23

CASES (Continued) **PAGE**

Neil v. Coleburn, 689 F. Supp. 1426 (E.D. Va. 1988) 23

Smith v. Clinton, 687 F. Supp. 1310 (E.D. Ark.), aff'd, 109 S. Ct. 548 (1988) 3, 5, 6, 18

Thornburg v. Gingles, 478 U.S. 30 (1986) ..... passim

United Jewish Organizations v. Carey, 430 U.S. 144 (1977) .. 25

White v. Regester, 412 U.S. 755 (1973) 26

STATUTES

Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 et seq. .... passim

MISCELLANEOUS

S. Rep. No. 417, 97th Cong., 2d Sess. (1982) 27

Motion to Dismiss or Affirm, Mississippi Republican Executive Committee v. Brooks, No. 83-1722 6

Petition for Certiorari, City of Norfolk v. Collins, No. 89-989 5

Petition for Certiorari, Sanchez v. Bond, No. 89-353 5

Sup. Ct. Rule 18.6 1

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 89-2008

BILL CLINTON, GOVERNOR OF ARKANSAS, *et al.*,
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v.

M.C. JEFFERS, et al.

On Appeal from the United States District
Court for the Eastern District of Arkansas

MOTION TO AFFIRM

Appellees move pursuant to Sup. Ct. Rule 18.6 to affirm the judgment below on the ground that the questions presented in the Jurisdictional Statement are so insubstantial on this record as not to require further argument.

Facts

Following the 1980 Census, new districts for the Arkansas General Assembly were drawn in 1981 by the State Board of Apportionment (then Governor Frank White,

Attorney General Steve Clark and Secretary of State Paul Riviere). Both House and Senate districts crossed political subdivision boundaries.[1] Although black citizens constituted 16% of Arkansas' voting-age population (VAP), and were highly concentrated in the eastern and southern parts of the State,[2] the 1981 districting plan resulted in

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[1]The 1981 House districting plan split 46 counties, ten townships and at least three municipalities among two or more districts, while the 1981 Senate plan split 27 counties, seven townships and at least two municipalities. PX 15. Several counties were carved up into four or five pieces, each of which formed a part of a separate district. *Id.* At least one city, Pine Bluff, was split to protect a white incumbent even though this configuration was not required to satisfy the one-person, one-vote principle. J.S. App. 34. One eastern Arkansas district included territory on both sides of the Arkansas River (with no bridge), forcing "citizens north of the river to drive more than 90 miles to reach the largest city in their district, where their state representative lives," J.S. App. 35.

[2]Since Reconstruction, no black has been elected to the General Assembly from eastern Arkansas, and only one district in southern Arkansas (majority-black) has elected a black representative.

legislative districts with a majority-black VAP only in Little Rock (in the center of the State) and Pine Bluff.[3]

Appellees brought this suit challenging the 1981 legislative district lines in these areas of the State[4] as violative of § 2 of the Voting Rights Act.[5] Following a twelve-day trial, the District Court made extensive findings

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[3]Of the total 35 Senate and 100 House districts, one Senate district and a three-seat House district in Little Rock, and one House district in Pine Bluff, had majority-black VAPs.

[4]As to Little Rock, appellees claimed that four single-member, majority-black VAP House districts could have been drawn in place of the three-member district. The remaining claims concerned single-member districts in eastern and southern Arkansas. (A multi-member House district in eastern Arkansas had previously been invalidated under § 2 of the Voting Rights Act, *Smith v. Clinton*, 687 F. Supp. 1310, *opinion on remedy*, 687 F. Supp. 1361 (E.D. Ark.), *aff'd*, 109 S. Ct. 548 (1988).)

[5]Appellees also claimed that intentional discrimination in drawing the 1981 plan and numerous other Fifteenth Amendment violations by State and local officials justified placing Arkansas under pre-clearance procedures pursuant to § 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c) (1981). In a separate, unreported opinion and order entered May 24, 1990, the District Court granted partial relief on this claim. A Notice of Appeal from this decision was filed on June 13, 1990.

on each of the factors identified by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), concluding that violations of § 2 had been proved as to the eastern and southern Arkansas legislative districts. J.S. App. 35-36, 39. The Court gave the current Board of Apportionment an opportunity to submit a remedial districting plan, which the Court accepted in part and modified in part to assure that black citizens whose rights had been violated would have an adequate opportunity to participate in the political process and to elect representatives of their choice in the 1990 legislative contest.[6] Under the remedy plan, the number of majority-black districts increased from one to three in the Senate and from five to twelve in the House.

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[6]The next General Assembly elections in Arkansas will be subject to a new redistricting plan to be devised when the results of the 1990 Census are available.

REASONS FOR SUMMARY AFFIRMANCE

Summary affirmance is appropriate in this case because the court below simply applied settled legal principles to the facts which it found based on ample evidence presented at trial. No substantial legal questions meriting plenary consideration are raised by appellants.[7] Indeed, both before and after its seminal interpretation of § 2 in *Thornburg*, the Court summarily affirmed two § 2 cases on facts very similar to those proved below.

In *Smith v. Clinton*, 109 S. Ct. 548 (1988), *aff'g* 687 F. Supp. 1310 (E.D. Ark. 1988), an eastern Arkansas multi-member House district was invalidated under § 2 based on findings nearly identical to those made below,

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[7]This case does not present the issues raised in the pending Petitions for Certiorari in *Sanchez v. Bond*, No. 89-353, and *City of Norfolk v. Collins*, No. 89-989, concerning the impact on § 2 claims of minority voter support for white candidates. Here, as in *Thornburg*, no statistical evidence was introduced concerning voting patterns in elections where there was no black candidate, and the evidence of racial bloc voting in elections where there *was* a black candidate was overwhelming.

except that "the record made in this case is much fuller than the one made in *Smith*" and thus the findings are more detailed, J.S. App. 25. In *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984), *aff'g Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984), a single-member congressional district was held to violate § 2 because "it combined the majority black Delta area with six predominantly-white eastern counties to create a district which was majority white in voting age population." *Brooks*, No. 83-1722, Motion to Affirm 4-5. As we demonstrate briefly below, the judgment in this action should also be summarily affirmed because it correctly applies the statute and the teaching of the decision in *Thornburg*.

A. The Judgment Is Supported by Unimpeachable Findings on the Relevant Factors Identified in *Thornburg* and a Fully Supported Conclusion, Based on the Totality of the Circumstances, that Black Citizens' Opportunity to Participate in the Political Process and to Elect Representatives of Their Choice Was Limited and Denied by the 1981 General Assembly Districting Plan.

In its opinion, the court below articulated the applicable standards for evaluating a claim that § 2 of the Voting Rights Act was violated by legislative districting:

> Dilution may be much more obvious in a case like *Smith* where a potential majority of black voters was submerged in a two-member district. But the basic principle is the same. If lines are drawn that limit the number of majority-black single-member districts, and reasonably compact and contiguous majority-black districts could have been drawn, and if racial cohesiveness in voting is so great that, as a practical matter, black voters' preferences for black candidates are frustrated by this system of apportionment, the outlines of a Section 2 theory are made out. Whether such a claim will succeed depends on the particular factual context, including all of the factors that *Thornburg*, *Smith*, and the legislative history of Section 2 say are relevant.

J.S. App. 16. The trial court carefully applied § 2 to the "particular facts" and made well-supported determinations on each of the relevant factors.

1. *Size and geographic compactness of the minority group.* (478 U.S. at 50 and n.17)

The District Court found that "black communities in the areas of the State challenged by plaintiffs are sufficiently large and geographically compact to constitute a majority in single-member districts." J.S. App. 17. Appellees had presented evidence that, using the data available in 1981, two additional, majority-black VAP Senate districts, and seven additional, majority-black VAP House districts could readily have been created.[8]

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[8]These "alternative districts" were presented not as proposed remedies but to establish, as *Thornburg* requires, that the black population was sufficiently large and geographically compact to constitute majorities in single-member districts. In fact, the remedy ultimately adopted by the court below differed significantly from the "alternative districts" configuration presented at the liability hearing. As was true of the challenged 1981 plan, each "alternative district" presented by the appellees included (continued...)

Appellants' principal complaint about the compactness finding is that some of the appellees' exemplary majority-black VAP districts would have required the splitting of municipalities among legislative districts; however, the court below found that the 1981 plan followed no consistent policy of maintaining political subdivision boundaries, and that counties, cities and townships were all divided by the Apportionment Board to accomplish various goals, ranging from compliance with one-person, one-vote requirements to the protection of incumbents, J.S. App. 34. The alternative districts in *Thornburg* split counties,

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[9](...continued)
portions of one to four Arkansas counties.

Although the District Court referred to 16 "alternative districts," *e.g.*, J.S. App. 17, this number includes the majority-black VAP districts that already existed at the time of trial (one Senate district and four House districts created under the 1981 plan and the House district established as part of the remedy in *Smith v. Clinton*), as well as the additional House district in Little Rock sought by appellees. Thus, in eastern and southern Arkansas (the areas in contention on this appeal) a total of nine, new, majority-black VAP "alternative districts" were presented.

and the District Court's reasoning there is equally applicable to the splitting of a few municipalities here: "To the extent that the policy ... was to split counties when necessary to meet population deviation requirements or to obtain § 5 preclearance of particular districts ... such a policy obviously could not be drawn upon to justify, under a fairness test, districting which results in racial vote dilution." *Gingles v. Edmisten*, 590 F. Supp. 345, 355 (E.D.N.C. 1984), *aff'd in part and rev'd in part on other grounds sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986).[9]

2. *Racially polarized voting.* (478 U.S. at 52-58)

The District Court had "little difficulty in finding that voting patterns [throughout the districts challenged by appellees] are highly racially polarized." J.S. App. 20.

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[9]The dissent below agreed that the 1981 district lines diluted black voting strength in at least three districts. See J.S. App. 156 (Phillips County), 156-160 (Ashley, Desha and Chicot counties), 164 (Jefferson County).

This finding was based on overwhelming evidence, both statistical and narrative, concerning elections in the areas covered by the challenged or "alternative" districts.[10]

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[10]Dr. Richard Engstrom, an expert witness whose work was cited with approval in *Thornburg*, 478 U.S. at 46, 48, 53, 55, analyzed every election since 1978 in which a black candidate ran for the General Assembly; he also examined racial voting patterns in 36 separate contests since 1976 (constituting all of the countywide election contests between a black and white candidate for which data were available in the relevant counties); and he studied two Congressional races and the Jesse Jackson presidential primary results in eleven Arkansas counties. He subjected each set of election returns to the standard methods of bivariate ecological regression and homogeneous precinct analysis employed in *Thornburg*, 478 U.S. at 52 & n.20, 53. Regardless of the method used, the results consistently revealed a "pronounced and persistent" pattern of racially polarized voting "across counties, across candidates, and across time." PX 3, at 2 [Engstrom written report].

Appellees also presented narrative testimony about racial polarization in election contests from the areas of the State in which districts were challenged. *See, e.g.*, TR Oct. 2, 1989 (afternoon) 5, 6-7, 8 (Sam Whitfield), III 141-142, 144, 145, 146, 167 (Lonnie Middlebrook), Oct. 2, 1989 (morning) 66-68, 70-75, 77, 79-85 (Robert White), III 33, 57, 61-62 (Roy Lewellan), IV 184-187, 189 (Jean Edwards), IV 88-89, 97-98, 103 (Andrew Willis). Two white legislators who testified for the defendants admitted that voting was racially polarized in their districts. TR X 49, 146.

(continued...)

Appellants assert that plaintiffs did not prove political cohesion among black voters in the hypothetical "alternative districts" because these were districts "in which the voters had never voted together before on state legislative races," J.S. 18. Since these were by necessity hypothetical districts, plaintiffs proved political cohesion in the only way possible -- by establishing the existence of

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[10](...continued)

The dissenting opinion below concluded that blacks are politically cohesive in seven districts. J.S. App. 147, 151, 155, 158. The dissent also concluded that plaintiffs proved legally significant racially polarized voting in Crittenden, Phillips, Monroe, Chicot, Desha, Lee, Jefferson and Ouachita counties, counties which include a substantial part of each of the alternative districts. J.S. App. 150, 151-152, 155, 157, 161-162, 163, 168. The dissent incorrectly reports that plaintiffs introduced no evidence of racially polarized voting in Mississippi, St. Francis, Ashley and Lincoln counties. J.S. App. 150, 162, 167, 157. For St. Francis County evidence, *see* TR III 179-80, 185-186 (blacks receive 90-97% of vote in black wards and 1% in white wards), 188, 189 (only 1 white leader in county has ever publicly supported a black candidate), IV 154, 155, 162. For Mississippi County, *see* TR III 141-142, 144, 145, 150, 167. For Ashley County, *see* TR V 100-102. For Lincoln County, *see* PX3 (Engstrom report) at 12.

severe racially polarized voting in the component counties and showing that this racial polarization crossed county lines in state legislative elections and the 1988 presidential primary.[11] As the Court recognized in *Thornburg*,

> Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

478 U.S. at 57 n.25.[12] The record in this case is replete

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[11]Voting patterns in the 1988 presidential primary clearly establish that black voters in Arkansas are cohesive across county lines. In the 11 counties for which data was available, the percentage of the black vote for Rev. Jackson ranged from 81.5 to 97%. PX 3, at 12 (single regression analysis).

[12]Appellants complain that appellees "could find only ten races for legislative seats in which black candidates ran against white candidates" and claim that it was improper for the District Court to rely on exogenous [non-legislative] elections." J.S. at 18-19. In a situation where the District Court explicitly found that black candidates for the legislature were subjected to retaliation and did not run because they knew the effort would be futile, J.S. App. 26-

(continued...)

with evidence of "other factors" that support the District Court's finding that racially polarized voting exists in each of the challenged districts.[13]

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[12](...continued)
27, 31, the Court's reliance on countywide data and narrative testimony is clearly appropriate.

The dissent below contends that appellees were required to demonstrate that the 1981 district lines split politically cohesive groups of black voters who had been in the same district under the 1971 districting plan for the General Assembly. J.S. App. 93-94. Such a requirement would transform the § 2 "results" test into the "retrogression" standard under § 5 of the Voting Rights Act. The fact that a state has *always* fractured geographically compact groups of black voters does not insulate a districting plan from challenge under § 2.

[13]The District Court found that "[t]o this day, [in southern and eastern Arkansas] the races live separately, . . . they go to church separately, and they even die separately. . . . [A]s late as October 2 of [1989], the City of Marianna was maintaining, at public expense, a cemetery for whites only." J.S. App. 30. Governor Clinton, one of the appellants, stated in 1986 that "[t]here is no question in my mind that those counties have been held back by the dominance of what I call the old plantation attitudes over there about what the proper place of blacks is and what the proper place of whites is." PX 30gg at 3, TR VII 103. Governor Clinton also stated that campaign events in which he participated were segregated by race until at least 1986. PX 30gg at 3, TR VII 103-104.

3. *History of discrimination and present effects of discrimination.* (478 U.S. at 44-45)

"[T]here is a long history of official discrimination. It has a present effect. And some instances of it are still occurring." J.S. App. 27. These findings were based on extensive evidence presented at trial which showed recent and continuing barriers to black political participation in the areas of the State where General Assembly districts were challenged.[14]

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[14]For example, the court below found, based on that evidence, that:

> Polling places have been moved on short notice; deputy voting registrars have, with isolated exceptions, been appointed only as a result of litigation; efforts have been made to intimidate black candidates. . . . [T]hese and similar practices clearly result in discouraging black participation in elections.

J.S. App. 26. The court also found that black candidates had suffered violence, harassment, intimidation and criminal prosecution on false charges. *Id.* "This kind of intimidation no doubt had a powerful chilling effect." *Id.* at 27. See *Lewellen v. Raff*, 649 F. Supp. 1229 (E.D. Ark. 1986)(injunction against criminal prosecution (continued...)

4. *Racial appeals in political campaigns.* (478 U.S. at 45).

The District Court found: "Racial appeals, some quite offensive, are common in campaigns in which a white candidate is running against a black candidate." J.S. App.

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[14](...continued)
commenced in retaliation for decision of black attorney in eastern Arkansas to run for office), *aff'd*, 843 F.2d 1103, *opinion modified*, 851 F.2d 1108 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 1171 (1989).

The District Court also found that "the history of discrimination has adversely affected opportunities for black citizens in health, education and employment. The hangover from this history necessarily inhibits full participation in the political process." J.S. App. 14. "Many more whites than blacks are high-school graduates, and many blacks were educated in schools that were both separate (by compulsion of law) and unequal. . . . [P]overty among blacks is more nearly the rule than the exception. Blacks tend to have fewer telephones and fewer cars. If a person has no phone, cannot read, and does not own a car, the ability to do almost everything in the modern world, including vote, is severely curtailed." *Id.* at 27. ***See also id.*** at 28 (county-by-county chart showing socio-economic status of blacks and whites in areas of education, income, families living in poverty and availability of telephones and vehicles).

29.[15] Appellants do not challenge the lower court's finding of fact on this subject.

5. *The extent to which blacks have been elected.* (478 U.S. at 45)

The District Court found that black candidates were successful only in those few legislative districts that had a

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[15]In 1975, for example, a supporter of a white candidate for Mayor of Pine Bluff publicly warned that "if white voters didn't turn out, there would be a black mayor." J.S. App. 30. In a black candidate's campaign for County Judge in Desha County, the white incumbent used "profanity and a racial epithet" at a public rally. *Id.*

The dissenting opinion below expresses "supris[e] at how little evidence of overt or subtle racial appeals plaintiffs were able to produce." J.S. App. 135. In fact, plaintiffs introduced evidence of numerous racial appeals made by white candidates and their authorized representatives. *See* TR III 62-63 (white candidate for state legislature in Lee, Phillips and Monroe counties in 1986 stated to whites "you know he's black," about opponent as part of campaign strategy), IV 150-52 (in 1986 white candidate for mayor of Forrest City (St. Francis County) mailed out leaflet to white neighborhoods featuring picture of black opponent), V 98-99 (campaign worker for white candidate for legislature in Jefferson County in 1982 made telephone calls to voters in white neighborhoods stating that opponent was black), V 94-95 (in 1978 state representative election in Jefferson County, white incumbent ran newspaper advertisement with a photograph of his black opponent).

black voting majority. J.S. App. 31. Until the decision in *Smith v. Clinton*, no black had been elected to the General Assembly from the Arkansas Delta region.[16] No black candidate (at least since Reconstruction) had ever won a statewide election or a countywide election in any of Arkansas' 75 counties. *Id.* Appellants do not challenge these findings.

6. *Use of majority-vote requirements.* (478 U.S. at 45)

The District Court found that Arkansas has "a majority vote requirement affecting races for the General Assembly and many other public offices." J.S. App. 29. Appellants do not challenge this finding.[17]

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[16]Prior to *Smith*, only one legislative district outside Pulaski County (Little Rock) had ever sent a black person to the General Assembly.

[17]In its decision on appellees' pre-clearance claim, *see supra* note 5, the court found that the General Assembly acted with discriminatory intent in enacting four different majority-vote statutes since 1972. Slip Op. May 24, 1990.

7. *Lack of responsiveness of elected officials.* (478 U.S. at 45)

Although "there is a widespread feeling . . . among black voters" that "white legislators in the Delta are insensitive to the concerns of poor black people," J.S. App. 31, the District Court ruled that "the charge that white legislators in the Delta are unresponsive to black needs has not been proved to our satisfaction on this record," *id.* at 32.

8. *Other factors.* (478 U.S. at 45)

On the strength of the policy underlying the 1981 plan, the District Court concluded: "There are a number of crosscurrents here, and they point in various directions. On the whole, we are not persuaded that this factor has much weight." J.S. App. 35. The Court found that the other factors listed in the Senate Report and discussed in *Thornburg* had no applicability to this case: candidates run for a designated seat and thus single-shot voting would have no practical significance; none of the challenged

districts was unusually large; "[a]s far as we know the process of slating plays no part in races for the Arkansas Legislature." *Id.* at 29.

9. *The totality of the circumstances.* (478 U.S. at 46)

The District Court balanced the totality of the circumstances in each of the districts challenged by appellees. In "the Delta, the Jefferson County area, and the Ouachita-Nevada counties area as a group," the Court found: "On balance a clear answer emerges. In these areas, black political opportunity is significantly lessened by the 1981 apportionment plan, and the plan violates Section 2 of the Voting Rights Act." J.S. App. 35-36. In the Little Rock area, the Court found that "the whole political atmosphere, with respect to black opportunity and participation, seems more open," *id.* at 38, and rejected appellees' claims.

The trial court's careful application of the "totality of the circumstances" approach required by the statute and

by *Thornburg* refutes appellants' repeated assertions that the Court maximized black voting strength or required proportional representation.[18] Moreover, had the District Court been driven by proportional representation as the measure of liability it would have found in favor of plaintiffs' Little Rock claim.[19]

B. The Legal Issues Sought to be Raised by Appellants Do Not Merit Plenary Review in this Case.

As we have summarized above, the District Court carefully assessed the evidence and made appropriate findings on each of the factors identified in the statute,

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[18]*See, e.g.*, J.S. 14, 23. The District Court expressly adhered to the statutory provision that "members of a protected class have no right to be 'elected' in numbers equal to their proportion to the population. 42 U.S.C. § 1973(b)." J.S. App. 30.

[19]The District Court found that the factors present in eastern and southern Arkansas also existed to a significant degree in Little Rock and that a fourth compact and contiguous, majority-black district could be drawn in Little Rock. J.S. App. 36-38.

according to the framework established by the Court's ruling in *Thornburg*. Indeed, if anything, the record and findings below are even more compelling than in *Thornburg*. The only distinction between the cases is that here the challenge involved single-member rather than multi-member districting. Appellants urge that this distinction justifies plenary consideration of this matter.[20] However, although the question was formally pretermitted by the Court in *Thornburg*, 478 U.S. at 46 n.12, the Court explained that (478 U.S. at 50 n.16):

> In a different kind of case, for example a gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multi-member or single-member districts, with the effect of diluting the potential strength of the minority vote.[21]

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[20]"[T]he *Gingles* formulation does not fit neatly in a single-member district situation." J.S. 15.

[21]Justice O'Connor also noted:

> There is no difference in principle between

(continued...)

As noted previously, in *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984), this Court summarily affirmed a lower court decision that precisely this violation of § 2 had occurred in the creation of a congressional district.[22] Because the District Court in this case carefully and correctly followed the road map provided by *Thornburg*, further review is inappropriate and unnecessary.

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[21](...continued)

> the . . . varying effects of alternative single-district plans and multi-member districts. The type of districting selected and the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice.

478 U.S. at 87 (concurring opinion).

[22]*Accord Gingles v. Edmisten*, 590 F. Supp. 345, 355 (E.D.N.C. 1984), *aff'd in part and rev'd in part on other grounds sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986); *Neil v. Coleburn*, 689 F. Supp. 1426 (E.D. Va. 1988); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983). (There is no conflict among the lower courts on this point.)

Neither the Jurisdictional Statement nor the dissent below properly raise any question of law that remains unanswered after *Thornburg*. Appellants' first "Question Presented" -- whether § 2 requires a showing that minority citizens have both less opportunity to participate in the political process and less opportunity to elect candidates of their choice -- does not arise here since the District Court explicitly found that appellees proved *both* a lesser opportunity to participate *and* a lesser opportunity to elect. J.S. App. 9-10. The court below expressly rejected appellants' assertion that black citizens in eastern and southern Arkansas "have just as much opportunity to participate in the political process as anyone else," finding that "[t]his argument fails to reckon with the present effects of past racial discrimination, much of it official and governmental." J.S. App. 14.

The second "Question Presented" in the Jurisdictional Statement -- whether *Thornburg* was correctly

applied, is merely a disagreement with the court below on factual issues, and the District Court's findings of fact must be affirmed unless clearly erroneous, 478 U.S. at 78-79. Appellants fail to identify any specific finding that is clearly erroneous and, as we have shown above, the findings are well supported in this record.

The third "Question Presented" -- whether the court below properly ordered that the remedy include three legislative districts having effective black VAP majorities -- raises no substantial legal issue. Once a violation of § 2 was found, the District Court simply and correctly applied the same remedial principles enunciated in *Thornburg* and other cases to insure that black citizens whose voting strength had been diluted under the 1981 plan would have a realistic opportunity to participate in political contests and to elect candidates. *See United Jewish Organizations v. Carey*, 430 U.S. 144, 162 (1977)(minority districts "at a minimum and by definition . . . must be more than 50%

black . . . [in order] to ensure the opportunity for the election of a black representative"); *Beer v. United States*, 425 U.S. 130, 141-42 (1976); *City of Richmond v. United States*, 422 U.S. 358, 370-71 (1975); *White v. Regester*, 412 U.S. 755, 768 (1973).[23] The District Court did

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[23]The District Court accepted without modification six of the Apportionment Board's nine remedial districts. The record clearly supports the Court's conclusion that three of the Board's eastern Arkansas districts did not create effective black-majority VAP districts and would not cure the violations, J.S. App. 197-98. In addition to the unrefuted evidence of lower voter registration and turnout among blacks, *e.g.* TR Oct. 2, 1990 (morning) 52, and severe racially polarized voting, PX3, the court below found that in eastern Arkansas, the "center of the black population," *id.* at 200, official discrimination calculated to have a "powerful chilling effect" on black political and electoral participation, *id.* at 27 and depressed socioeconomic conditions, *id.* at 28, were particularly egregious.

The District Court also correctly concluded that these three districts drawn by the Apportionment Board themselves violated § 2. Appellees' expert witness gave uncontradicted evidence that the configuration of these districts continued to fracture black population concentrations; the Apportionment Board rejected less dilutive options and chose lines that artificially depressed black voting majorities and favored incumbents, J.S. App. 200; and the court found that there was no legitimate state

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nothing more than "exercise its traditional equitable powers so that it completely remedie[d] the prior dilution of minority voting strength and fully provide[d] equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982).[24]

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[23](...continued)
policy or "neutral, nondiscriminatory reason" for drawing the district lines submitted by the Apportionment Board, J.S. App. 200, and that the Board was motivated by a desire to protect white incumbents at the expense of black challengers, *id.*

Governor Clinton, one of the appellants, objected to the Board's House plan because in seeking to protect an incumbent in eastern Arkansas, it spurned "the best opportunity to resolve the historic dilution of black voting strength in that region." J.S. App. 200. The Governor submitted his own remedial House plan that included a nonincumbent district in eastern Arkansas.

[24]Appellants' assertion that the District Court remedy maximized black voting strength is patently false. Directly at odds with such a goal, the court below *rejected* modifications which appellees had proposed to increase the black VAP of the Board's new Senate district in southern Arkansas explicitly because "black voters [must] have equal opportunity, [but] we do not think [the Apportionment Board] should be faulted for failure to give black voters an additional edge," J.S. App. 202.

Finally, the District Court did not abuse its discretion in rejecting appellants' laches claim.[25]

The dissenting opinion below is founded on a

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[25]Laches is a discretionary, equitable doctrine that involves a balancing of all of the circumstances. *Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525, 534 (1956). Here the District Court concluded that the balance lay in favor of appellees' claims. J.S. App. 12. There is no reason for this Court to second-guess that balancing of the equities.

In any event, appellants did not meet even the minimum requirements to make out a claim of laches, because they did not prove either unreasonable and inexcusable delay in appellees' assertion of their rights or material prejudice resulting from that delay, *Costello v. United States*, 365 U.S. 265, 282 (1961); *Gardner v. Panama Railroad Company*, 342 U.S. 29, 31 (1951). The economic harm alleged in this Court, see J.S. 25-26, is directly attributable to the State's violation of the Voting Rights Act, not to any delay on the part of appellees. In addition, the cost of remedying the violation -- the process of redistricting -- has already been incurred and proved to be neither prohibitive nor significantly disruptive. Finally, although appellants argued that "there is absolutely no reason to believe that districts drawn according to [the remedial orders below] will produce different electoral results" from the 1981 plan, *id. at 26*, the May, 1990 primary elections held under the new plan produced results dramatically different from any past election. Black candidates won every election in which they ran in the newly configured districts.

passionate disagreement with the fundamental premises of the Voting Rights Act, as clarified by the 1982 amendments.[26] It does not identify clearly erroneous

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[26]However intense the feelings of the dissenting judge, his basic disagreement is with the Congressional policy choice and it provides no justification or need for this Court to engage in plenary review of the faithful implementation of *Thornburg* and the legislative history of § 2 by the court below. For example, the dissent imports an intent requirement into § 2, in direct contravention of *Thornburg*, 478 U.S. at 70-74; *id.* at 83 (concurring opinion), and the 1982 amendments. The dissent also disregards much of the record evidence on the factors which *Thornburg* indicated should be canvassed in a § 2 case because, in its view, "some of the actual Senate factors may have no more relevance than the extent to which minority group members drink coffee." J.S. App. 74. The dissent would limit consideration of the factors identified in the legislative history to cases challenging "a voting literacy test or a financial burden test (*e.g.*, poll tax)," *id.* at 120, apparently excluding their relevance even to at-large challenges in direct contravention of the approach outlined by this Court in *Thornburg*.

Indeed, while it accuses the appellees of having failed to establish that black citizens in the challenged districts have "less opportunity than others to participate in the political process," *id.* at 62, the dissent would limit § 2's coverage to direct impediments to a black citizen's opportunity to register, to enter a polling booth and to pull the lever, *id.* at 64. The dissent does not, however, dispute the majority's finding that "the diminished socio-

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findings of fact[27] or any legal errors which this Court

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[26](...continued)
economic status found to have resulted from prior discrimination" results in blacks having "less opportunity to participate in the political process," J.S. App. 85. Reduced to its essence, therefore, the dissent simply refuses to make the judgment required by the Act and by *Thornburg* on the basis of the "totality of the circumstances."

[27]The dissenting opinion below, in concluding that current discriminatory voting practices are "isolated," J.S. App. 125, ignores overwhelming evidence in the record. Plaintiffs introduced uncontroverted evidence that polling places in black wards were routinely moved during the two weeks before the election and that no notice was posted at the old location, *e.g.*, TR Oct. 2, 1989 (morning) 18-21, IV 172-173, 176 (Phillips County), III 130-132 (Chicot County; black ward polling places moved at least twice in last five years), IV 127-130 (Chicot County), III 157-159 (Mississippi County), and that polling places for black wards are placed in inhospitable, inconvenient and inaccessible locations, such as the City jail, TR III 130, 136 (Chicot County), and a white country-western club distant from the black community, TR Oct. 2, 1989 (afternoon) 33-35 (Lee County), III 44-46 (Lee, Phillips, Monroe counties), IV 129-130 (Chicot County), IV 173 (Phillips County).

Plaintiffs also showed that in many counties virtually all of the election judges, sheriffs of the day and clerks were white persons, such as farmer's wives in areas where blacks worked on white-owned farms, who intimidated and discouraged black voters. *E.g.* TR III-51
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[27](...continued)
(Lee County), III 173-174 (Phillips County), III 125-26 (Chicot County) (in 1988 voting booths provided in white wards but not in black wards thus depriving black voters of ballot privacy), IV 118-119 (white candidates inside the polling place; black candidates not allowed inside), IV 123 (all Chicot County election judges are white), IV 124 (paper ballots filled out on a plain table and white election judge looks over shoulders), III 151-54, 155-56, 161 (Mississippi County).

In Desha and Ashley counties, white poll officials refused to allow illiterate black voters to be assisted by relatives and blacks who challenged the practice were physically threatened, TR IV 92-96, V 107-109.

The dissenting opinion also accuses the majority of using a "scattershot" approach and of failing to analyze each challenged district separately, but the record and the findings refute this charge. Appellees introduced overwhelming evidence on each relevant factor in each challenged area. The evidence showed that eastern and southern Arkansas share a common plantation history replete with official and private discrimination having continuing present effects, and that extreme racially polarized voting, racial campaign appeals, intimidation of candidates and other currently effective barriers to black political participation characterize the entire region. It was unnecessary for the District Court to repeat the same factual findings over and over for each separate district. Instead, the Court found that this pattern existed across eastern and southern Arkansas, in every affected county and legislative district. When the trial court found a departure from this pattern, in Little Rock, it described it
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should correct, or *could* correct after a careful review of the massive evidentiary record in this case.

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[27](...continued)
as an exception to the general pattern and found no § 2 violation, J.S. App. 35-37. In eastern and southern Arkansas, there was no exception to the pattern, as the trial court explicitly found. J.S. App. 35-36.

Conclusion

For the foregoing reasons, the judgment of the District Court should be affirmed summarily.

Respectfully submitted,

P.A. HOLLINGWORTH
415 Main Street
Little Rock, AR 72201
(501) 374-3420

OLLY NEAL
33 North Poplar Street
Marianna, AR 72360
(501) 295-2578

DON E. GLOVER
P. O. Box 219
Dermott, AR 71638
(501) 538-9071

L. T. SIMES
P. O. Box 2870
West Helena, Arkansas
72390
(501) 572-3796

PENDA D. HAIR*
SHEILA Y.THOMAS
1275 K Street, N.W.
Suite 301
Washington, D.C.
20005
(202) 682-1300

JULIUS L. CHAMBERS
CHARLES STEPHEN RALSTON
NORMAN J. CHACHKIN
DAYNA L. CUNNINGHAM
99 Hudson Street,
16th floor
New York, NY 10013
(212) 219-1900

*Counsel of Record

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